No. 13,701

In The

United States Court of Appeals For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

GEORGE WILLIAM PICKARD and
WILLIAM HERSHEL CAGLE,
Appellees.

REPLY BRIEF OF APPELLANT

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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QUESTIONS INVOLVED

Appellees raise in their answering brief the question of whether or not an affidavit of verification of an information filed by the United States Attorney of necessity must contain an oath. They further cite the Fourth Amendment to the United States Constitution.

ARGUMENT

As was previously pointed out in appellant's opening brief, an information need not be supported by an oath or affidavit unless it is the desire that a warrant of arrest issue upon such information in a misdemeanor charge. In

U. S. v. Grady, 185 F. 2d 273, the Court very succintly set out the rule to be followed in a case where an information is filed in a misdemeanor charge. The Court in that case stated, at page 275, as follows:

> "Whatever might have been the rule prior to the adoption of the Federal Rules of Criminal Procedure, 18 U. S. C. A., it seems plain by Rule 7(a) that an information need not be verified by affidavit, and it 'may be filed without leave of court.' And by Rule 9(a), it seems equally plain that an information need be supported by an oath only when there is a request by the government attorney for the issuance of a warrant, and in the absence of such oath only a summons will issue requiring the defendant to appear. Therefore, there is no basis for the argument that the affidavit in the instant case was either a part of the information or a requisite to its validity. Its sole purpose was to enable the government to obtain the issuance of a warrant."

In the instant case no warrant of arrest was requested, nor was any warrant of arrest ever issued, but the defendants voluntarily appeared in Court as a result of a Court order contained in the original dismissal of an indictment (R. 7). Consequently, the citations of appellees in this case are not in point, but go to those cases wherein an information was filed by the United States Attorney with an oath or affirmation or affidavit attached for the purpose of having the Court issue a warrant of arrest.

Further, the Fourth Amendment to the United States Constitution provides as follows:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, *and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,* and particularly describing the place to be searched, and the persons or things to be seized." (Emphasis ours.)

The wording of this section of the Constitution very definitely carries out the theory of the appellant in this case, that is, that no warrant shall issue but upon probable cause by oath or affirmation. The facts in the present case do not fall within the exclusion due to the fact that as a matter of record and as a matter of fact no warrant in this case was issued or requested at any time during the proceedings. Had the United States Attorney desired a warrant of arrest to issue upon the information he may have at any time filed an affidavit for the issuance of a warrant of arrest.

Appellees cite Rules 3, 4 and 5 of the Federal Rules of Criminal Procedure as being controlling in this matter. It is the feeling of the appellant that these rules are not an issue in this case, but that the issues involved arise under Rule 7 and Rule 9(a), which provide for a procedure of bringing a defendant before the bar, which is additional procedure to that set out in Rules 3, 4 and 5.

CONCLUSION

While it is true that Rules 3, 4 and 5 provide a procedure available to any accused person where no indictment is returned, so does Rule 7 provide a procedure for the filing of an information in a misdemeanor action where no indictment has been returned.

We, therefore, respectfully contend that under the laws set out in appellant's opening brief the Court erred in the instant case in dismissing the information, upon the grounds hereinbefore set out.

DATED: June 24, 1953.

Respectfully submitted,

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